1979

# Richard G. Foote et al v. Newton A. Taylor : Brief of Respondent

Utah Supreme Court



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# IN THE SUPREME COURT OF THE STATE OF UTAH

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| RICHARD C. FOOTE, SHIRLEY P. FOOTE, and VENICE THEATRE CORPORATION, | : | |
| Plaintiffs and Respondent, | : | Case No. 16533 |
| vs. | : | |
| NEWTON A. TAYLOR, | : | |
| Defendant and Appellant. | : | |

## BRIEF OF RESPONDENT


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BRIEF OF RESPONDENT

STATEMENT OF FACTS

On August 7, 1978, respondents, Richard G. Foote and Shirley P. Foote (Foote), agreed t 11 and appellant Newton A. Taylor (Taylor) agreed to buy the restaurant and theatre equipment located in the Venice Pizza Hut and Venice Theatre. This action concerns sale and lease of businesses located in Nephi, Utah, generally known as the Venice Theatre and the Venice House of Pizza. The real estate in which the businesses operate is owned by the Venice Theatre Corporation, a Utah Corporation, and the business equipment is owned by Richard G. Foote and Shirley P. Foote. The corporation and these individuals had listed this property for sale with Woodriver Realty, of Provo, Utah in the Spring of 1978.

The defendant Newton A. Taylor was employed as a salesman by Woodriver Realty and became acquainted with the property in such capacity. The details of this agreement were set out in an Earnest Money Receipt and Offer to Purchase which was signed by both Foote and Taylor. The purchase price for the equipment was $40,000. This amount was payable as follows: $1,000 down at the signing of the agreement, $5500 on or before October 15, 1978, $3500 on or before February 15, 1979. The remaining $30,000 was to be amortized over 15 years at 9 per cent interest. The resulting monthly payments were to be $304.29 with the initial payment due on August 15, 1978. This agreement in pertinent part stated that the down payment of "$1000 is non-refundable if buyer is unable to perform on contract."

Four days later, Venice Theatre Corporation granted the defendant Taylor a lease with an option to purchase. This lease and option concerned the real estate where the restaurant and theatre were located. The required monthly lease payment was $240 payable on the fifteenth day of each month. The lessee was allowed a credit of $35 per month due to the fact that the lessor was receiving that amount from another tenant in the building. Among other things, the lease stated, "In case of failure to faithfully perform the terms and covenants herein set forth, the defaulting party shall pay all costs, expenses, and reasonable attorney's fees resulting from the enforcement of this agreement or any right arising out of its breach."

At the time the lease was entered into, the roof over part of the restaurant area was in need of repair. Respondent verbally acknowledged responsibility for the cost of such repair. Appellant, a contractor, was given the option of performing the work himself and deducting the cost thereof from the lease payment or obtaining a bid elsewhere. (T. at 74 and 76) Deciding that he was too busy to fix the roof himself, appellant received an estimate from a qualified roofer. However, this estimate was never submitted to respondent.

By October 15, the parties were deadlocked over the issue of the roof: appellant refused to make either lease or purchase payments until the roof was repaired, and respondent refused to make repairs until he received the payments or assurance that they would be made if the repairs were completed. Communication deteriorated until the parties sought legal advice. In a telephone conversation on October 18, respondent's attorney was informed by appellant's attorney that the $5500 payment was in his trust fund and would be paid upon the completion of the roof repair. (T. at 16 and 146)

Relying on this information, respondent contracted for the roof to be fixed. Work on the roof commenced the week of October 24th and was completed on Saturday, October 28th - the date of a Halloween extravaganza at the theatre sponsored by appellant. (T. at 100) Without notice, appellant vacated the premises on or after October 31, 1978. In addition, appellant had not given the $5500 to his attorney and this sum was never paid to respondent.

During the term of his occupancy, appellant made two lease payments. No payment was ever made on the equipment. Throughout the period appellant operated the theatre and made a profit from that activity. (T. at 91) Immediately after taking possession of the restaurant, appellant began extensive remodeling of the kitchen area. All of the sinks and a plaster wall were removed. All electrical equipment including grills, heating elements, and water heaters had been disconnected. Only the pizza ovens were left intact. Cupboards only six years old had been removed and carted to the Nephi dump. At no time did respondent give appellant permission to remodel or dispose of items within the restaurant. Upon re-entry, respondent found the kitchen which had been operational at the time the lease was signed to be nearly dismantled. (T. at 23 and 61-62) The cost to restore the kitchen to working order was estimated to be at least $1500. (T. at 27)

While a tenant, appellant caused the locks of the building to be changed. The only keys were not given to respondent until after December 16, 1978. (T. at 82) Without access to the building, respondent was unable to properly winterize the premises. During a cold spell, some of the pipes froze and broke. The cost to repair this damage was over $900.

Neither the keys nor the premises were ever voluntarily surrendered to respondent. Only by obtaining a court order on December 6, 1978, was respondent able to re-enter and retake control of the property. Upon re-taking the building, respondent sought to relet the premises so as to mitigate further damage.

On November 2, 1978, respondent filed suit for damages in Fourth Judicial District Court and prayed for judgment in the amount of $6,348.58 plus costs and reasonable attorney fees. Appellant counter-claimed.

## DISPOSITION IN THE LOWER COURT

After hearing the case, the Honorable David Sam, District Judge, found that appellant had breached the purchase contract and the lease agreement. That there was no merger of the agreements. The Court found that respondent had suffered damages in the amount of $2,052.16 due to the loss of fair rental of the building and equipment; judged that respondent be allowed to retain as equitable compensation for damage to the pizza parlor, $1000, and awarded $1150 as reasonable attorney's fees.

## ARGUMENT

POINT I. THE TRIAL COURT CORRECTLY RULED THAT THE LEASE AND PURCHASE AGREEMENTS DID NOT MERGE, SINCE THERE WAS NO UNITY AS TO SUBJECT, TIME AND PARTIES.

Although appellant maintains as his first point that the Earnest Money Receipt and Offer to Purchase and the Lease Agreement were not separate agreements, but rather merged into one contract, this conclusion is incorrect. Appellant relies on Harty v. Hoerner as support for his contention.

The holding of that case in its entirety is:

> "Where different writings relating to the same subject are executed at the same time between the same parties, a fundamental principle of construction requires they be treated as one and the same instrument."
> 170 Colo. 506, 463 P.2d 313,314 (1969).

In other words, in order to effect a merger of writings, there must be a sameness of: 1)subject, 2) time, 3) parties. In this case the purchase agreement differs from the lease agreement in these significant and controlling points: a) there are two separate parties, i.e. Venice Theatre Corporation as to the lease agreement; Richard G. Foote and Shirley P. Foote as to the purchase agreement; b) they were not executed at the same time, i.e. the lease August 11, 1978, the purchase agreement August 7, 1978; c) the two writings concerned different subjects, i.e. the lease, real property and the purchase agreement, personalty; d) no unity in time of performance, i.e. the purchase agreement was to extend over a period of fifteen years while the lease would expire in three; e) no unity in consideration.

This situation is clearly distinguishable from the facts in Harty. In that case, plaintiff loaned $5000 to a company of which defendant was president. A promissory note and a subordination agreement were signed simultaneously. The company defaulted on the note and plaintiff sought to hold defendant personally liable. The subordination agreement expressly stated that defendant was only signing in his capacity as president and that the company was principally liable. The court held that there was a merger since both the note and the subordination agreement clearly concerned the same subject - the loan of the $5000. The subordination agreement was held necessary to explain the relationship of the parties.

In Reid v. Johnson, a California Court was faced with a situation remarkably similar to the case at hand. Three documents, two concerning the leaser of real property and one concerning the sale of personal property to be used in conjunction with the realty, were executed on or about the same day. It was appellant's contention that the various writings should be read as one contract. The Court, however, stated:

> "It is therefore the general rule that two or more separately executed instruments may be considered and construed as one contract only when upon their face they deal with the same subject matter and are by reference to one another so connected that they may be fairly said to be interdependent."
> 85 Cal. App. 2d 112,116, 192 P.2d 106, 108 (1948).

Upon examination of the agreements, the court found that the contracts did not make reference to the subject matter of each other. It stated:

> "Whether we take them together or separately, it is difficult to see how they can be construed together as one contract, when each appears to be a separate, independent agreement."
> 85 Cal. App. 2d 112, 116, 192 P.2d 106, 109.

Likewise in the present case, the lease makes no reference to the subject matter of the equipment purchase or vice versa. They are not interdependent; each is a separate independent contract.

A definition of merger may be helpful at this point. Construing contemporaneous instruments together simply means that if there are any provisions in one instrument limiting, explaining, or otherwise affecting the provisions of another, they will be given effect. This does not mean that the provisions of one instrument are imported bodily into another, contrary to the intent of the parties; they may be intended to be separate instruments and to provide for entirely different things. See Sterling Colorado Agency, Inc., v. Sterling Insurance Company, 266 F.2d 472,476(10th Cir. 1959). Moreover, the court in Sterling stated:

> "Considering several instruments as one is not the natural construction, and is resorted to only to effectuate the intention."
> 266 F.2d at 476.

In the present case, there has been no showing that the provisions in one instrument were intended to explain or limit the provisions of the other. The instruments were prepared by the appellant, who, through acting for himself, was also acting for Woodriver Realty. Consequently, they should be considered independent agreements.

POINT II. THE EVIDENCE PRESENTED AT TRIAL IS SUFFICIENT TO SUPPORT THE JUDGMENT OF DAMAGES AND ATTORNEY FEES.

It should first be noted if the judgment of the lower court that there were two separate agreements is affirmed, this argument is superfluous. Since a liquidated damages clause is contained only in the equipment purchase agreement, it could not be used to limit respondent's recovery on the lease agreement.

Moreover, it should also be noted that in his judgment, the trial judge stated in respect to the down payment, "Judgment allowing the plaintiff to retain as equitable compensation for damage to the Pizza parlor, $1000 down payment made on the purchase thereof." The judge made no mention of the money as liquidated damages. Rather the money was to go to pay for damages which accrued to the restaurant kitchen as a result of appellant's unauthorized remodeling.

Appellant testified he vacated the premises on October 31, 1978. (T. at 109) Respondent's complaint was filed November 2, 1978. Surely the mere passage of one day between breach and filing cannot be seen as unequivocable election on the part of the respondent to retain the down payment as his remedy. Rather it would seem that in immediately filing suit, respondent had elected to seek damages in a court of law. The judge noted this fact at trial. (T. at 103) Case law is in harmony with this proposition. In Walden v. Backus, the court ruled that it did not have to even consider the question of liquidated damages since "by filing this action the sellers elected to seek actual damage clause of the agreement." 81 Nev. 634, 408 P.2d 712,714 (1965).

In any event, if this particular money is taken to constitute liquidated damages, it should be noted that liquidated damages only compensate for injury due to breach of contract. A liquidated damages clause should not limit respondent's claims sounding in tort.

It cannot seriously be contended that respondent failed to prove any actual damage to the restaurant as a result of appellant's actions. On the contrary, respondent presented uncontroverted testimony that appellant had turned an operational restaurant into shambles. (T. at 23 and 61-62) Appellant himself admitted he failed to complete the work he had started. (T. at 124-125)

At trial, respondent presented an estimate of the cost to repair the kitchen. Appellant objected to the introduction of that evidence and attorney for respondent laid additional foundation for the evidence. There was no further objection. Appellant should not be allowed now to complain of its introduction.

Moreover, appellant has consistently maintained that the $1000 award is liquidated damages. However, it is precisely in situations where damages are speculative, indefinite, or uncertain, that an award of stipulated damages is appropriate. The Colorado Supreme Court stated:

> "One of the essential elements to the enforcement of a contract for retention of a sum paid as liquidated damages is that the damages to be anticipated are uncertain in amount or difficult to be proved."
> Grooms v. Rice, 163 Colo. 234, 429 P.2d 298, 300 (1967).

The uncertainty of actual damages occasioned by a breach of contract is immaterial. Rather, the amount of liquidated damages is presumed to be the amount of damage, King v. Oakley, 434 P.2d 868 (Okla. 1967) unless disproportionate to any possible loss that might have been contemplated, so that to enforce it would shock the conscience of the Court. Tennent v. Leary, 82 Ariz. 67, 308 P.2d 693 (1957).

The lease agreement which was signed by appellant stated that the defaulting party would pay reasonable attorney's fees resulting from the enforcement of any right arising out of a breach of the agreement. Appellant does not contend that the amount of the fee is unreasonable or that respondent did not breach the agreement. Rather he maintains that there was no necessity for incurring them and respondent was not justified in his demands. Interestingly enough, in appellant's counter-claim he also prayed for an award of reasonable attorney's fees. (T. at 145)

The rule in most jurisdictions is that a provision in a contract for attorney's fees in event of breach is valid. Utah has adhered to this rule early on. See McCornick v. Swem, 36 Utah 6, 102 P. 626(1909). Such a provision is regarded as a reasonable provision for reimbursement or indemnity to the creditor against the expenses incident to a default on the part of the debtor. Some cases base the rule on the conceded right of parties to make their contracts in whatever form they please, provided they conform to the law of the land. See McClain v. Continental Supply Co., 66 Okla. 225, 168 P. 815 (1917).

This view was affirmed by the Utah Supreme Court in Thatcher v. Industrial Commission where it stated, the judiciary "has the power to determine what is reasonable when the law or the contract of the parties provides for a reasonable fee." 115 Utah 568, 575, 207 P.2d 181 (1949).

## CONCLUSION

Because the plaintiffs did establish the existence of two agreements, breach thereof by appellant, and because the evidence was sufficient to establish the damage sustained as result of the breach, respondent asks that the judgment of the Court below be affirmed.

Respectfully submitted,

Milton T. Harmon

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## MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing Brief of Respondent was mailed first-class, postage prepaid to: Mr. D. John Musselman, Attorney for Appellant, at 1325 South 800 East, Suite 115, Orem, Utah 84057, on this 13th day of November, 1980.

Secretary